SUPREME COURT, U. S.

No. 73-509

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

IN THE MATTER OF JOHN McCANDISH KING,
Debtor in Proceedings for an Arrangement,

IN THE MATTER OF
KING RESOURCES COMPANY AND
INTERNATIONAL RESOURCES LIMITED,
Debtors in Proceedings for Reorganization of Corporations,

JOHN M. KING,

*Petitioner,*

*v.*

CHARLES A. BAER, TRUSTEE,

*Respondent.*

# ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF OF RESPONDENT CHARLES A. BAER, TRUSTEE IN OPPOSITION

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# BRIEF OF RESPONDENT CHARLES A. BAER, TRUSTEE IN OPPOSITION

## STATEMENT OF THE CASE

For the most part respondent, Charles A. Baer, Trustee of King Resources Company ("KRC"), is able to accept the Statement of the Case contained in the Petition, particularly with respect to the procedural history of this matter. A few additional facts should be mentioned, however,

and one significant factual error should be pointed out to this Court.

In his Petition the petitioner, John M. King ("King") makes the following statement: "The controversies involving King have their origin in a contract dated December 31, 1969, under which King bought and KRC sold an undivided 1/64 interest in certain Canadian federal oil and gas exploration permits." Petition, 6. Respondent has continually taken the position that the interests involved had *not* been "bought" or "sold," but rather that the contract was a mere contract to sell, which remained executory and rejectable. The language of the contract itself (A. 70-74) supported this interpretation, and both the reorganization court and the Court of Appeals agreed that the contracts were still executory and rejectable. (A. 216, App. to Petition, A-9).

The United States Internal Revenue Service was given actual notice of the proceedings on the Trustee's Application to reject an executory contract (A. 151), as a creditor and participant in the Chapter X reorganization proceedings of KRC, and this fact was noted by the Court of Appeals. App. to Petition, A-8.

## REASONS FOR DENYING THE WRIT

Contrary to petitioner's suggestion, the decision of the Court of Appeals below is in no sense in conflict with the decisions cited by petitioner, or indeed with the decision of any other court. Petitioner attempts to read the opinion of the Court of Appeals as holding that a vested property title can be divested by a Chapter X proceeding to reject an executory contract. Quite obviously, the Court of Appeals did not make such a ruling but instead merely agreed with the trial court's conclusion that the contracts were not "executed" and that the transfer of property title had not been accomplished. This holding does not depart from

any other rulings or established principles of bankruptcy law. In effect, petitioner is asking this Court to make a finding of fact contrary to the decisions below or to read into the holdings below a finding which was not made.

Just as there is no judicial conflict involved here, there is no question presented which has any importance "in the administration of the bankruptcy laws," as petitioner contends. Virtually all of the issues posed by petitioner involved permissible exercises of discretion by the courts below and findings which were amply supported by the evidence.

There exists no compelling reason for this Court to review this case, and the Petition for Certiorari should be denied. The issues discussed below correspond to the "Questions Presented" set forth at pages 4-5 of the Petition.

## I.

## THE COURT OF APPEALS PROPERLY UPHELD THE REFEREE'S RULING THAT RESPONDENT WAS NOT ENJOINED FROM PROCEEDING WITH THE APPLICATION TO REJECT EXECUTORY CONTRACT.

Petitioner King urges that the Court of Appeals, the district court and the referee all committed reversible error in failing to hold that the Trustee's Application to Reject Executory Contracts constituted a "suit" within the meaning of the referee's stay order, and in thus permitting the trustee to proceed on the application to reject executory contracts.

The Court of Appeals properly recognized the frivolous and ephemeral nature of this argument and properly disposed of it in three sentences, as follows:

> "As the decision to issue an injunction staying the commencement of suits is committed to the discre-

> tion of the bankruptcy referee, we do not deem it necessary to determine the status of the Trustee's application to reject the executory contract as a suit. So too the decision of the referee to vacate a previously issued restraining order or allow other proceedings relating to the debtor's property is discretionary. We find no abuse of the arrangement referee's discretion in permitting the trustee's application to reject the executory contract." App. to Petition, A-7.

It is absurd to suggest that this Court should now grant certiorari jurisdiction for the purpose of second-guessing the discretion of the three tribunals who have previously considered the question. In any event, the issue is governed by the following principles. The grant or denial of a stay in Chapter XI proceedings "is a matter of discretion, and the enjoining of suit is an abuse of discretion where the stay would be unjust under the circumstances." 8 Collier, Bankruptcy, ¶ 3.21, p. 259. A debtor in an arrangement proceeding is clearly not entitled to a stay order as a matter of right. *Foust v. Munson Steamship Lines,* 299 U.S. 77 (1936). It is essential to note that the referee was interpreting his own order, and it is fundamental that a court's interpretation of its orders is to be interfered with lightly. See, *e.g.,* 60 C.J.S., Motions and Orders §64, p. 111.

While petitioner has quoted broad definitions of the term "suit" in his Petition, the more pertinent inquiry is whether an application to reject an executory contract constitutes a "suit" within the meaning of the Bankruptcy Act. An instructive decision in this regard is *Burnham v. Todd,* 139 F.2d 338, 341 (5th Cir. 1943), where the court held that the Bankruptcy Act, in fixing the venue of "suits", does not include summary proceedings wherein the bankruptcy court is asserting its own right to administer. An application to reject an executory contract is also concerned with

summary proceedings under the Bankruptcy Act where the reorganization court is exercising its own right to administer. Significantly, the power to reject executory contracts resides with the court, and indeed there is authority that a court may exercise that power *sua sponte;* see *e.g., In re Cheney Bros.,* 12 F. Supp. 605 (D. Conn. 1935).

Quite clearly the ruling of the referee, like the decisions of the district court and the Court of Appeals affirming it, was legally correct and an altogether legitimate exercise of his discretion. The exercise of that discretionary jurisdiction is simply not a proper subject for review in this Court. *First Nat. Bank in Houston, Texas v. Lake,* 199 F.2d 524 (4th Cir. 1952).

## II.

## THE COURT OF APPEALS PROPERLY AFFIRMED THE REORGANIZATION COURT'S DENIAL OF PETITIONER'S MOTION TO DISMISS FOR FAILURE TO JOIN THE IRS AS A PARTY.

Petitioner contends that the Court of Appeals erred in affirming the district court holding that the United States Internal Revenue Service ("IRS") was not an indispensable party whose lack of joinder required dismissal of the Trustee's Application to Reject an Executory Contract. The contention is a specious one which fails to acknowledge the actual facts as well as the nature of the reorganization proceedings.

As the Court of Appeals properly concluded, "the notice requirements for the rejection of executory contracts require only notice to the parties to such contracts. Any notice to other parties lies in the discretion of the judge." App. to Petition, A-8. This limited notice requirement is contained in the very section of the Bankruptcy Act which governs proceedings to reject executory contracts in a Chap-

ter X reorganization. Section 116 (1) of the Act, 11 U.S.C. §516 (1), provides in pertinent part that the judge may "permit the rejection of executory contracts of the debtor except contracts in the public authority, *upon notice to the parties to such contracts* and to such other parties in interest as the judge may designate." (Emphasis added.)

Although there was thus no requirement that the IRS be given notice, it is quite significant to point out to this Court that the IRS was in fact given actual notice. As the Court of Appeals recognized, the trial court had ordered that notice be given to creditors who had filed statements under §§210 and 211 of the Bankruptcy Act, 11 U.S.C. §§610, 611. App. to Petition, A-8. The IRS was one of the creditors which had filed such a statement. Such notice was given, and the trial court specifically found that the IRS had notice of the hearing. A. 154. This fact was also noted by the Court of Appeals. App. to Petition, A-8.

The flimsiness of petitioner's contention that the IRS should have been joined as a party is best dramatized by simply pointing out that the IRS was *already* a "party" to all of the reorganization proceedings. Creditors of the debtor such as the IRS who have filed their required appearances through compliance with §§210 or 211 of the Bankruptcy Act "are by statute parties to the proceedings" and no formal order of intervention is necessary. See 6A Collier, Bankruptcy ¶ 9.23, at pp. 303-306.

In summary, the IRS was a party to the proceedings and had actual notice of the Trustee's Application to Reject an Executory Contract. Petitioner's imaginative attempt to seek certiorari on this non-issue must be rejected.

## III.

## THE COURT OF APPEALS PROPERLY AFFIRMED THE HOLDING THAT THE REORGANIZATION COURT HAD SUMMARY JURISDICTION

AND THAT THE CONTRACT WAS EXECUTORY AND REJECTABLE.

Petitioner's argument that the reorganization court lacked summary jurisdiction to entertain the Trustee's Application to Reject an Executory Contract is fraught with critical factual fallacies. Indeed, petitioner's entire position is premised upon one central factual assumption which is wholly unsupported by the record or by the decisions of both courts below: namely, the assumption that petitioner had already acquired vested title to the Arctic permits at the time the petition for reorganization was filed.

It is clear that petitioner has argued this position vehemently at every juncture, but it is equally clear that neither the reorganization court nor the Court of Appeals has agreed with petitioner's contention. On the contrary, the reorganization court explicitly concluded that the purchase contract between KRC and petitioner "is, in fact and in law, an executory contract which is subject to rejection by the trustee . . ." App. to Petition, A-27. Among other findings, the reorganization court also concluded that "the contract neither gives John M. King nor the Colorado Corporation any possessory rights in the property." App. to Petition, A-29. Manifestly these findings fly in the face of petitioner's contention that he had received vested title. There can be no doubt that the reorganization court and the Court of Appeals flatly rejected petitioner's factual and legal contentions in this regard.

Based upon his incorrect assumption that the courts below allowed a rejection which had the effect of actually divesting title, petitioner has urged the existence of a conflict which is in fact merely an imagined one. The Court of Appeals has not made a ruling which departs in any manner from the rulings in *In re American National Trust*, 426 F.2d 1059 (7th Cir. 1970); *Laugharn v. Bank of America*, 88 F.2d 551 (9th Cir. 1937), *cert. denied*, 301 U.S. 699

and *In re H .K. Porter Co.*, 24 F. Supp. 766 (W.D. Pa. 1938) to the effect that a rejection cannot serve to divest vested title. Respondent trustee has never quarreled with that proposition. The critical fact remains that the principle does not come into play in the present case, for petitioner did not establish, and no court has found, that he received any vested title which could have been "divested" by the rejection proceedings.

Notably, petitioner has never come forth with any documents of title such as deeds or assignments which might have buttressed his contention. Similarly, no suggestion has been made that petitioner is in actual possession adverse to the KRC or the trustee. This matter of possession alone distinguishes the present situation from the *In re American National Trust* case, *supra,* where the court specifically pointed out that the party who had objected to summary jurisdiction had actual adverse possession of the property. See 426 F.2d at pp. 1065-1066.

The petitioner's continuing, and rejected, claim that he had received vested title merely by having executed the purchase contract and having made one down payment (of approximately 5% of the purchase price) has been countered and briefed in detail by respondent trustee at both the trial and Court of Appeals level. A repetition of the trustee's position at this juncture does not appear to be necessary or fruitful. This Court is undoubtedly not interested in tampering with or upsetting the factual findings of the trial court, which are amply supported by the record.

One factual item should be brought to the Court's attention, however, in that it consists of an express admission on the part of the petitioner that his contract with KRC remained "executory" within the meaning of the Bankruptcy Act. In his own arrangement proceedings under Chapter XI of the Bankruptcy Act petitioner listed the purchase agreement as an "executory contract." (A. 75, 78). This admis-

sion clearly rebuts his own subsequent contention that the agreement was not executory and rejectable and that he had already received vested title.

In summary, petitioner did not have any kind of vested property interest which could have diminished or defeated the jurisdiction of the reorganization court. The critical fact remains that the reorganization court had before it executory contracts of the debtor and possessed summary jurisdiction under the Bankruptcy Act to authorize their rejection. Significantly, the reorganization court has the power in the first instance to determine whether it has jurisdiction to proceed. See *e.g., Matter of Tax Service Ass'n. of Illinois,* 305 U.S. 160 (1938); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940); *In re Dolly Madison Industries, Inc.,* 326 F. Supp. 441, 443 (E.D. Pa. 1971); 1 Collier, Bankruptcy ¶ 2.05, at p. 150. The reorganization court properly found that the contracts did not give petitioner any possessory rights and that the Chapter XI arrangement court did not have any exclusive jurisdiction over the contracts or their subject matter such as would prevent the reorganization court from possessing and exercising its own summary jurisdiction. A. 217.

## IV.

## THE COURT OF APPEALS PROPERLY RULED THAT RESTITUTION IS NOT A CONDITION TO THE REJECTION OF AN EXECUTORY CONTRACT UNDER THE BANKRUPTCY ACT.

Another of petitioner's contentions can be quickly laid to rest. In the fourth of his "Questions Presented," petitioner argues that the reorganization court exercised its jurisdiction in an inequitable manner by failing "to condition rejection upon restitution of the money paid by John M. King for the property acquired under the contract." Petition, 5.

At the outset it may be noted that petitioner's argument is based upon the mistaken assumption of fact that John M. King "acquired" property. Both the trial court and the Court of Appeals have rejected petitioner's contention that he received a vested property interest.

Beyond this incorrect factual assumption, however, it is clear that petitioner continues to confuse the trustee's power to seek rejection of an executory contract with the remedy of rescission. It has been specifically held that the rejection of an executory contract under §116 (1) of the Bankruptcy Act (11 U.S.C. §116 (1)) is *not* a rescission but rather a proceeding which is *sui generis*. See *Ray v. Beneficial Fin. Co.*, 92 N.J. Super. 519, 224 A.2d 143 (1966). This decision was cited by Petitioner as well. (See Petition, 22).

It is well established that, unlike rescission, rejection constitutes a breach of contract which can give rise to a claim against the rejecting party for damages. See, *e.g.*, *Workman v. Harrison*, 282 F.2d. 693, 699 (10th Cir. 1960); 6 Collier, Bankruptcy, ¶ 3.24 at pp. 592-594. This fact is recognized by the petitioner (see Petition, 22), and was stressed by the Court of Appeals. App. to Petition, A-9. Petitioner has a full and adequate remedy for any relief to which he may be entitled by filing a claim in the reorganization proceedings of KRC. Petitioner's reliance upon *Parker v. Baltimore Paint & Chemical Corp.*, 244 F. Supp. 267, 270 (D. Colo. 1965) is totally misplaced, for it deals with an action for rescission rather than rejection, as is the case here.

The plain fact remains that, as the Court of Appeals phrased it: "There is no basis for the requirement of restitution upon the rejection of the executory contract." App. to Petition, A-9. Petitioner's position is simply unsupportable and affords no proper or viable ground for granting the Petition for Certiorari.

## CONCLUSION

For the reasons herein stated the Petition for Certiorari should be Denied.

Respectfully submitted,

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Dated: October 16, 1973

## CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Brief in Opposition to Petition for Writ of Certiorari upon each party in accordance with the provisions of paragraph 1 of Rule 33, Revised Rules of the Supreme Court of the United States, by depositing such copies in the United States post office, postage prepaid by air mail, or regular mail respectively, this 16th day of October, 1973, addressed to counsel of record for each party at the office of each such counsel, as follows:

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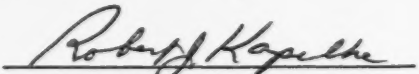

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